

**NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.**  
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

FILED BY CLERK

DEC 17 2008

COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

CHRISTOPHER P. PESQUEIRA,

Petitioner Employee,

v.

THE INDUSTRIAL COMMISSION OF  
ARIZONA,

Respondent,

GILBERT ELECTRIC COMPANY,  
INC.,

Respondent Employer,

SCF ARIZONA,

Respondent Insurer.

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2 CA-IC 2008-0005  
DEPARTMENT B

MEMORANDUM DECISION

Not for Publication  
Rule 28, Rules of Civil  
Appellate Procedure

SPECIAL ACTION - INDUSTRIAL COMMISSION

ICA Claim No. 20072-250029

Insurer No. 0723224

Gary M. Israel, Administrative Law Judge

AWARD AFFIRMED

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Christopher P. Pesqueira

Tucson  
In Propria Persona

The Industrial Commission of Arizona  
By Laura L. McGrory

Phoenix  
Attorney for Respondent

State Compensation Fund  
By James B. Stabler and Jeffrey L. Patten

Tucson  
Attorneys for Respondents  
Employer and Insurer

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E C K E R S T R O M, Presiding Judge.

¶1 In this statutory special action, petitioner employee Christopher Pesqueira challenges the decision of the administrative law judge (ALJ) denying his claim for workers’ compensation benefits. Pesqueira asks this court to reverse the ALJ’s award and remand the matter for further hearings because (1) he “did not feel well represented by [his] attorney,” (2) Pesqueira’s absence from two of three hearings made him “unable to defend [him]self or bring in evidence critical to [his] case,” and (3) the ALJ made incorrect findings as a result. We affirm the award for the reasons set forth below.

### **Factual and Procedural Background**

¶2 We view the evidence in the light most favorable to sustaining the ALJ’s findings ““and will not set aside the award if it is based on any reasonable interpretation of the evidence.”” *Rent A Ctr. v. Indus. Comm’n*, 191 Ariz. 406, ¶ 1, 956 P.2d 533, 534 (App. 1998), *quoting* *Ariz. Dep’t of Pub. Safety v. Indus. Comm’n*, 176 Ariz. 318, 324, 861 P.2d

603, 609 (1993); *see also Salt River Project v. Indus. Comm'n*, 128 Ariz. 541, 544-45, 627 P.2d 692, 695-96 (1981).

¶3 Pesqueira worked at a copper mine as an electrician for the respondent employer Gilbert Electric Company on July 10, 2007, the day of his injury. Upon admitting himself to the hospital with a fractured right tibia, fibula, and ankle, he informed an admissions nurse that he had tripped on a curb. Later that day, however, he stated he had fallen from a ladder at work. Pesqueira testified that he had lied initially about his injury because he did not have paperwork authorizing him to work at the mine site. He nevertheless maintained that he had sustained his injury while on the job.

¶4 Pesqueira testified that, after he fell off the ladder, he sought help from his coworker, Paul Ortiz. Pesqueira testified he informed Ortiz about his broken leg and asked Ortiz to report the injury to their foreman. Pesqueira also testified that, when he told Ortiz about his injury, Ortiz related his own stories about injuring his leg at work. But Ortiz's own testimony did not support Pesqueira's version of their interaction. Ortiz testified that Pesqueira had simply said he had to leave the work site because he had received a phone call about a family emergency. According to Ortiz, Pesqueira had told Ortiz he would return the next day to get his tools but said nothing about being injured. And Ortiz, who saw Pesqueira walk to his vehicle and drive away, observed nothing suggesting Pesqueira was hurt. Ortiz called the foreman and told him Pesqueira had left and would be back the following day.

¶5 The ALJ found Pesqueira’s version of events “incredible” and concluded that Pesqueira had sustained his injury after he left the jobsite. The ALJ denied Pesqueira’s claim for workers’ compensation benefits and affirmed that decision on review. This statutory special action followed.

### **Discussion**

¶6 In the first of his three related arguments, Pesqueira claims his attorney provided inadequate representation and therefore requests that this court “reverse the ALJ’s award and remand the matter . . . for further hearings.” Specifically, Pesqueira contends his attorney mistakenly informed him that he need not personally attend two of the three hearings. He also suggests counsel failed to present evidence Pesqueira deemed critical to the case. But even if we were to assume his counsel’s performance was deficient, this would not provide grounds for disturbing the ALJ’s decision.

¶7 In civil cases, unlike criminal cases, the remedy for ineffective assistance of counsel is limited to a malpractice claim. *See Glaze v. Larsen*, 207 Ariz. 26, ¶ 20, 83 P.3d 26, 31 (2004) (“In the civil context, a party generally cannot obtain post-judgment relief because of the inexcusable neglect of counsel.”); *but see John M. v. Ariz. Dep’t of Econ. Sec.*, 217 Ariz. 320, ¶¶ 12-13, 173 P.3d 1021, 1024-25 (App. 2007) (noting ineffective assistance of counsel may be grounds for relief from termination of parental rights). And, as with civil judgments, decisions by an Industrial Commission ALJ may not be challenged on the basis that a claimant’s counsel was ineffective; allowing such challenges would be

contrary to our established public policy encouraging final judgments and discouraging serial litigation. *See Panzino v. City of Phoenix*, 196 Ariz. 442, ¶ 19, 999 P.2d 198, 204 (2000) (“Permitting relief from judgments entered as a result of an attorney’s actions clearly undermines the ‘undeniable public policy that recognizes the finality of judgments and discourages multiplicitous litigation.’”), *quoting Smith v. Saxon*, 186 Ariz. 70, 74 n.3, 918 P.2d 1088, 1092 n.3 (App. 1996).

¶8 Pesqueira’s argument regarding his absence from two hearings similarly fails to state a ground for relief. As he correctly notes in his brief, the Rules of Workers’ Compensation Practice and Procedure provide that all claimants must be present at all hearings unless excused by the ALJ. *See* Ariz. Admin. Code R20-5-149(A). Contrary to Pesqueira’s suggestion, however, a claimant’s failure to appear does not affect the finality of the ALJ’s decision. Rather, a claimant’s unexcused absence from a hearing exposes him to possible sanctions, including dismissal of his claim. *See* Ariz. Admin. Code R20-5-157; *see also Town of El Mirage v. Indus. Comm’n*, 127 Ariz. 377, 380-81, 621 P.2d 286, 289-90 (App. 1980). Therefore, Pesqueira’s absence from the hearings does not entitle him to an opportunity to present additional evidence. *See Higgins v. Indus. Comm’n*, 16 Ariz. App. 136, 138, 491 P.2d 1138, 1140 (1971) (“[E]vidence submitted after a formal hearing is not admissible.”).

¶9 Finally, Pesqueira suggests the ALJ made erroneous findings due to his failure to consider “critical evidence.” An employee bears the burden of proving an injury is

compensable. *See Yates v. Indus. Comm’n*, 116 Ariz. 125, 127, 568 P.2d 432, 434 (App. 1977); *see also Malinski v. Indus. Comm’n*, 103 Ariz. 213, 216, 439 P.2d 485, 488 (1968). To do so, the employee must show he suffered an injury that “arose out of and in the course of his employment,” establishing a “causal relationship between work activity and injury.” *O’Donnell v. Indus. Comm’n*, 125 Ariz. 358, 360, 609 P.2d 1058, 1060 (App. 1979); *see also* A.R.S. § 23-1021(A). We defer to an ALJ’s factual determinations and will not disturb those findings unless they are unsupported by any reasonable theory of the evidence. *See Vance Int’l v. Indus. Comm’n*, 191 Ariz. 98, ¶ 6, 952 P.2d 336, 338 (App. 1998); *Joplin v. Indus. Comm’n*, 175 Ariz. 524, 526, 858 P.2d 669, 671 (App. 1993); *Assoc’d Grocers v. Indus. Comm’n*, 133 Ariz. 421, 424, 652 P.2d 160, 163 (App. 1982). Thus, an award will not be set aside if there is reasonable evidence in the record to support it. *See Mustard v. Indus. Comm’n*, 164 Ariz. 320, 321, 792 P.2d 783, 784 (App. 1990).

¶10 By that standard, the record here supports the ALJ’s award. The ALJ found Pesqueira’s account of the accident “was contradicted by both . . . Ortiz’s testimony and internally by [Pesqueira]’s own testimony.” The ALJ “is the sole judge of witness credibility” and is free to reject a claimant’s testimony “if it is self-contradictory, inconsistent with other evidence, or directly impeached.” *Holding v. Indus. Comm’n*, 139 Ariz. 548, 551, 679 P.2d 571, 574 (App. 1984). The ALJ here resolved the conflict in the testimony against Pesqueira, concluding he had suffered his injury after leaving the work site. Because

Ortiz’s testimony provided a sufficient basis for this conclusion, we have no basis for second-guessing the ALJ’s findings or his decision to deny benefits.

**Disposition**

¶11           The award is affirmed.

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PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

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PHILIP G. ESPINOSA, Judge

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GARYE L. VÁSQUEZ, Judge